Supreme Court, U.S.
FILED
JUN 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1781

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE ALGOMA STEEL CORPORATION, LIMITED,
Petitioner

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICUS CURIAE CANADIAN EXPORTERS' ASSOCIATION

CRAIG D. MILLER
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800
Counsel for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	2
CONCLUSION	5

TABLE OF AUTHORITIES

Treaty:

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 3

Statutes:

Trade Act of 1974, § 201, 19 U.S.C. § 2251 (1982 & Supp. V 1987) 4

Trade Agreements Act of 1979, §§ 731, 736, 19 U.S.C. §§ 1673, 1673d (1982 & Supp. V 1987) .. 2, 3

28 U.S.C. §§ 1295, 1581 (1982 & Supp. V 1987) 4

Congressional Materials:

H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979) 3, 4

S. Rep. No. 249, 96th Cong., 1st Sess. (1979) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1781

THE ALGOMA STEEL CORPORATION, LIMITED,
Petitioner

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICUS CURIAE CANADIAN EXPORTERS' ASSOCIATION

INTEREST OF THE AMICUS CURIAE [1]

The Canadian Exporters' Association is a non-profit organization consisting of about one thousand Canadian companies—including manufacturers, trading houses, commodity producers, transportation companies, consulting engineers, construction companies, consultants, financial institutions, and service companies—all with a common interest in exports. Founded in 1943, the CEA is the only national association in Canada devoted solely to advancing the interests of Canadian exporters. Among its

---

[1] All parties have consented to the filing of this brief. Copies of their written consents have been filed with the Clerk.

objectives is to encourage domestic and international programs conducive to the sustained growth of export trade.

Canada is this nation's largest trading partner. CEA's members (including petitioners and other Canadian steel companies) accounted for a substantial portion of the $84.3 billion of merchandise exported by Canada to the United States in 1988. The organization believes that the question presented by the petition in this case has broad implications for the future conduct of fair trade between our two countries.

ARGUMENT

Under U.S. law, antidumping duties may be imposed only upon proper findings that "a class or kind of foreign merchandise" is sold in the United States at less than its fair value and that a U.S. industry is materially injured "by reason of imports of that merchandise." 19 U.S.C. § 1673. In this case, the Department of Commerce determined that, during a six-month period in 1985, some oil country tubular goods imported from Canada were sold at less than fair value. The Department's sale-by-sale analysis demonstrated, however, that a substantial portion of such imports—in excess of 50 percent—was sold at fair value.

The International Trade Commission found that a domestic industry was materially injured by reason of the importation of oil country tubular goods. Based on that finding, the Department of Commerce issued an antidumping duty order, which requires importers to make burdensome cash deposits for estimated duties on the entry of oil country tubular goods.

The dispute in this case arises because the Commission, in making its injury determination, took into account *all* imports of oil country tubular goods, including the substantial percentage sold at *more* than fair value. For all that appears from the record, the injury to domestic industry may have been caused exclusively by the fairly traded imports and not at all by the less-than-fair-value sales.

The question is whether a finding of injury from sales of a class of merchandise at less than fair value may properly take into account injury from sales of the same class of merchandise at more than fair value. The Trade Agreements Act of 1979 specifies that antidumping duties may be imposed only if a domestic industry is injured "by reason of" sales of dumped merchandise. 19 U.S.C. §§ 1673, 1673d. It is incompatible with that language to impose antidumping duties when the injury is caused by sales at fair prices.

The legislative history confirms that Congress never intended such a result. The statute was enacted to conform U.S. antidumping law to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code). H.R. Rep. No. 317, 96th Cong., 1st Sess. 59 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 61 (1979). Article 3 of the Antidumping Code provides, in terms that speak directly to the question here, that "it must be demonstrated that the dumped imports are, *through the effects of dumping*, causing injury"; "injuries caused by other factors"—including "the volume and prices of imports not sold at dumping prices"—"must not be attributed to the dumped imports." Antidumping Code Art. 3, para. 4 & n.5, 31 U.S.T. 4919, T.I.A.S. No. 9650 (emphasis added).

In its report on the legislation, the House Committee on Ways and Means made clear that it understood and endorsed the causation requirement of the Antidumping Code. It stated that "material injury must be 'by reason of' the subsidized or less than fair value imports" and that "the law does not contemplate" taking into account "other factors"—including "the volume and prices of . . . imports sold at fair value"—"which may be contributing to overall injury to an industry." H.R. Rep. No. 317, *supra*, at 46-47.

The decision of the Court of Appeals erroneously transforms the antidumping law, designed to protect against

injury only from *unfairly* traded imports, into a law that protects against injury even from *fairly* traded imports. Section 201 of the Trade Act of 1974, 19 U.S.C. § 2251, is an example of the latter; its standards are quite different from those of the antidumping provisions at issue here. Congress recognized that difference. The Committee on Ways and Means stated that "[t]his statute is not intended to 'protect or remedy' an injury from imports as contemplated under section 201 of the Trade Act of 1974, nor is it just one of several remedies from which the Administration may choose to remedy import injury to a domestic industry. Rather, it is a remedy targeted at a specific type of injury caused by unfair import competition, and the Committee expects it to be administered in that context." H.R. Rep. No. 317, *supra*, at 46.

The decision below is likely to have a significantly deleterious effect on Canadian-U.S. trade. Under an antidumping duty order, U.S. importers must pay estimated duties, in the form of cash deposits, on the entry of all the merchandise covered by the order. It may not be until years later that final duties are assessed. Although imports at fair value may not ultimately be assessed antidumping duties, the need to deposit estimated duties can put an exporter or an importer out of business long before the final duties are assessed. That is so because the estimated duties impose a real financial burden, last a long time, and introduce a potentially crippling element of uncertainty into all affected transactions. As the petitioner correctly notes, "[i]mporters . . . face an unlimited contingent liability if they import merchandise subject to an antidumping duty order." Pet. 25 n.29.

Because the Federal Circuit has exclusive jurisdiction to review the ITC's injury determination under the antidumping law (*see* 28 U.S.C. §§ 1295, 1581), its decision in this case, if left undisturbed, will effectively foreclose further consideration of the significant statutory issue in this case. We are concerned about the practical implica-

tions of that decision for fairly traded goods between our two countries. More generally, we are concerned that the decision below, by interpreting the statute in a manner that departs from the Congressional purpose and the terms of the Antidumping Code, jeopardizes the free trade objectives that animate both U.S. law and the international trade agreements to which the United States is a party. We urge this Court to review the judgment of the Court of Appeals to ensure that those important objectives are vindicated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAIG D. MILLER
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800
Counsel for Amicus Curiae

JUNE 1989